

1 BEN ELLISON, WSBA #48315  
2 Email: salishsealegal@outlook.com  
3 SALISH SEA LEGAL PLLC  
4 2212 Queen Anne Avenue North, No. 719  
5 Seattle, WA 98109  
6 Telephone: (206) 257-9547  
7 Unsecured Creditors Committee

5 UNITED STATES BANKRUPTCY COURT  
6 FOR THE EASTERN DISTRICT OF WASHINGTON

8 In re:  
9 GIGA WATT, INC.

10 Debtor.

11 18-03197-FPC11

12 COMMITTEE'S MOTION TO  
13 COMPEL PRODUCTION OF  
14 CONFIDENTIAL PERKINS COIE  
15 MATERIALS IN THE POSSESSION  
16 OF THE CHAPTER 11 TRUSTEE

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17 I. PRELIMINARY STATEMENT

18 The Committee propounded a subpoena on the Chapter 11 Trustee  
19 ("Trustee") on September 22, 2020. **Exhibit A** to Declaration. The subpoena  
20 directed the Trustee to produce all documents in his possession previously received  
21 from Perkins Coie.

22 The Trustee's counsel has refused to produce any such documents, as she  
23 asserts that they are subject to the confidentiality terms of a Protective Order  
24 relating to the same. ECF No. 673.

25 The Committee maintains that either (a) the Committee is an express  
26 beneficiary to a safe harbor provision in the Protective Order, or (b) a valid court  
27 order, compelling production of the underlying documents, may trump the terms of  
28 the existing Protective Order. Regardless of the Court's interpretation, once the

1 documents are made available to the Committee, counsel is willing to abide by the  
2 existing terms of the Protective Order.  
3

## 4 II. STATEMENT OF FACTS 5

6 At the prompting of the Committee, the Chapter 11 Trustee propounded and  
7 obtained discovery materials from Perkins Coie through a 2004 Exam. ECF No.  
8 632.

9 Before Perkins Coie produced responsive documents, it required the Trustee  
10 to enter into a Protective Order. ECF No. 673. The Protective Order requires the  
11 Trustee not to share confidential documents it receives – except with “*any party in  
12 interest to this bankruptcy directly concerned with the issues then in dispute  
13 relating to such Confidential documents.*” *Id.*  
14

15 The Committee believes that it is a party in interest to this bankruptcy  
16 directly concerned with the issues.  
17

18 To that end, the Committee sought its own 2004 exam, requiring the Trustee  
19 to produce, *inter alia*, all the documents the Trustee had obtained from Perkins  
20 Coie. ECF No. 692.

21 In response to the Committee’s application, the Trustee argued that the safe  
22 harbor did not cover the Committee. ECF No. 693 at p.3. No explanation was  
23 provided as to who specifically the language would cover, if not the Committee.  
24

25 On September 17, 2020, the Committee took the Trustee’s exam. He  
26 testified that he did not know who would fall within the scope of the safe harbor  
27  
28

1 language. He also conceded that he did not know that the Committee was  
2 excluded from such protective language. Declaration at ¶ 2.  
3

4 At the deposition, the Trustee also conceded that he could not or did not  
5 know what role Perkins Coie had played in the Giga Watt initial currency offering,  
6 or how it conducted itself with regard to the release of escrow funds. He could not  
7 answer how much legal counsel was paid, nor could he even specify who Perkins  
8 Coie's client was in the whole transaction if not Giga Watt Inc. Declaration at ¶ 3.  
9

10 Based on this testimony, none of the law firms aware of the existence of  
11 possible claims here was able to agree that they wanted to take on the work on a  
12 contingent fee basis for the estate, certainly not without seeing the underlying  
13 documents. Declaration at ¶ 4.  
14

15 Three business days later, the Committee propounded a subpoena  
16 specifically requesting these documents once again from the Trustee. Declaration  
17 at ¶ 5.<sup>1</sup> Production was requested for September 25, 2020, although if time were  
18 an issue, the Committee offered to allow production to occur on September 28 or  
19  
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21  
22  
23 <sup>1</sup> The subpoena was propounded after the oral exam, not before because (a) it  
24 seemed unlikely that between the court ruling and the fixed date of the deposition,  
25 the Trustee could comply with the document request, and (b) it was only after the  
26 oral exam that it would be clear to the law firms considering the matter, what  
27 specific documents they still wanted to see. Indeed, it was possible if the Trustee  
28 did not interpose the defense of the Protective Order throughout the oral exam, and  
spoke candidly and with sufficient specifics, there would be no need to see all the  
underlying documents from Perkins Coie.

1 29, 2020. *Id.*

2       Trustee's counsel declined, and citing a family emergency, was unable to  
3 commit to a specific date for a meet and confer on this topic. Declaration at ¶ 6.  
4  
5 On September 24, 2020, the Trustee's counsel nonetheless cited as her objection to  
6 the subpoena in an e-mail. **Exhibit B** to Declaration.  
7

8       Production of the documents was requested for today, but none were  
9 produced. The Trustee has known since August 17, 2020, when the Committee  
10 shared a draft of the 2004 exam, that these documents were being sought.  
11

12       Historically, it is true that the Trustee has shared apparently all non-  
13 confidential documents it received from Perkins Coie. *See* Trustee's Supplemental  
14 Declaration, ECF No. 739 at p. 2. *This amounts to a grand total of 5 pages of*  
15 *production*, and is insufficient to entice any law firms to formally commit to taking  
16 on the present litigation. Declaration at ¶ 7.  
17

18       Finally, in the Supplemental Declaration filed today, Mr. Waldron states that  
19 he has now spoken with 1 of the 4 law firms recommended by the Committee, and  
20 reached out to another law firm. *Id.* at p. 3. These accommodations are too little  
21 and too late, because (a) documents have still not been shared with any of the law  
22 firms – and without them, none can commit to taking on the litigation, (b) the  
23 Committee asked the Trustee in writing to secure no-fee counsel more than 2  
24 months ago, and (c) since that time, the Trustee's counsel insisted on continuing to  
25 conduct all due diligence herself, billing on an hourly basis, and/or engaging in  
26  
27  
28

1 unnecessary motions practice to beat back attempts by the Committee to obtain  
2 these disclosures.<sup>2</sup>  
3

4                   **III.               LEGAL ARGUMENT**

5                   The motivating need for the responsive documents is set forth in the  
6 Committee's Supplemental Memorandum re Conversion. ECF No. 731. In short,  
7 the new Chapter 7 Trustee will need to employ counsel to prosecute the Perkins  
8 Coie matter – if at all – immediately after being appointed. The Trustee concedes  
9 that the statute of limitations is about to run.

10                  The Chapter 11 Trustee has been unwilling or legally unable to assist in  
11 including other law firm candidates in the case file here, because he construes the  
12 terms of the Protective Order in the strictest possible sense. Because the  
13 Committee wants the Chapter 7 Trustee to have options other than the Chapter 11  
14 Trustee to prosecute this matter, it requests the Court to order that the document  
15 materials that the Chapter 11 Trustee obtained from Perkins Coie be shared with  
16

20  
21 \_\_\_\_\_  
22                  <sup>2</sup> The writing was on the wall here long ago. The Committee warned everyone that  
23 would listen on December 12, 2019 that it thought this case would fail. ECF No.  
24 431. The Trustee assured everyone that he had a plan. Precisely nothing  
25 unexpected happened in the ensuing 10 months until the UST filed its motion to  
26 convert and suddenly the Chapter 11 Trustee conceded there was no plan. If  
27 conversion was always going to happen, administrative costs could have been  
28 capped or substantially lessened if conversion had been agreed to long ago, or the  
Trustee has accepted the influence of the Committee, and proceeded in a manner  
other than what the Trustee chose, which included substantial and unnecessary  
contentious litigation over the last 10 months.

1 the three law firms the Committee has identified as potentially willing to take on  
2 the litigation on a contingent fee basis.  
3

4       The Court can order the Trustee to produce the documents on one of two  
5 theories. The subpoena, **Exhibit A**, is a duly-enforceable subpoena under FRCP  
6 45, made applicable by FRBP 9016. Here, the Trustee has objected to producing  
7 any documents based on legal impossibility due to the Protective Order between it  
8 and Perkins Coie. Under FRCP 45(d)(2)(B)(i), this Court may nonetheless compel  
9 the production of such documents.  
10

11       The documents may be produced because there is no legal impediment to  
12 doing so, for the Trustee has testified at his 2004 exam, he does not dispute that the  
13 Committee might be the beneficiary of the safe harbor language. Indeed, the safe  
14 harbor language is broad, and should cover a party as related to the Trustee as the  
15 Committee, who has shared legal counsel on certain matters in this case.  
16

17       Alternatively, even if the Committee were not expressly entitled to the  
18 documents pursuant to the language of the Protective Order, the Trustee can still be  
19 compelled to turn over the documents. The Protective Order is effectively a court-  
20 endorsed nondisclosure agreement, which agreements never trump normal  
21 discovery or prelitigation discovery rights, and indeed, are typically made subject  
22 to any court order.  
23

24       The Court should properly compel disclosure, and to the extent that Perkins  
25 Coie is concerned over its ethical obligation to keep client confidences – the  
26

1 remedy for protecting them from the Trustee – agreeing to the Protective Order –  
2 should resolve any concerns here. The Committee would agree to the terms of the  
3 existing Agreement if the Court orders production of the underlying documents to  
4 the Committee.

## IV. CONCLUSION

The present issues were presented earlier to the Court when it considered whether to authorize the Committee’s 2004 Exam. ECF No. 715. The Court authorized such exam, but based on objection by the Trustee on the same grounds over confidentiality, postponed a decision on whether the Protective Order insulated documents from production. *Id.* at p.3. As the current Chapter 11 case converts to Chapter 7, it is appropriate for the Court to rule on this issue.

DATED this 25th day of September, 2020.

## SALISH SEA LEGAL PLLC

By: /s/ Benjamin A. Ellison  
Ben Ellison, WSBA No. 48315  
Jason E. Wax, WSBA No. 41944  
2212 Queen Anne Ave. N., No. 719  
Seattle, WA 98125  
Tel: (206) 257-9547

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